

# Judicial Reform in Japan: Its Outline and Characteristics

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## INTRODUCTION

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## INTRODUCTION

In Japan, judicial reform has been widely discussed since the 1990s and some reforms have already been put into practice. For example, to create a legal profession that is rich both in quantity and quality, the number of legal professionals is gradually increasing. Law schools were newly established in 2004. To promote public participation in the administration of justice, a saiban-in system (citizen judges similar to a jury system) is to be implemented by 2009. To expand public access to justice, Japan Legal Support Centers that perform as legal aid and public defense centers for suspects and defendants are to be established all over the country. This

paper will sketch recent judicial reform in Japan and discuss its characteristics and expected impact on Japanese society.

### I. JAPAN'S JUSTICE SYSTEM AFTER WORLD WAR II

#### *A. Limited Role of Justice*

Historically, Japan has not experienced a fundamental change in its justice system since the judicial reforms immediately following World War II<sup>1</sup>. Although the number of litigants has increased, the number of legal professionals has not. While the number of civil and administrative cases newly accepted in district courts rose approximately 8.4 times between 1950 and 2002, judges increased only approximately 1.5 times in the same period<sup>2</sup>. This small number of legal professionals was a result of the limited number of successful candidates for the National Bar Examination (NBE)<sup>3</sup>. The budget for the judicial branch has been also curbed and the budget for the courts occupies only approximately 0.4% of the total national budget for these twenty years<sup>4</sup>.

Judicial matters have been decided

only according to the wishes of the three branches of the legal profession (the Ministry of Justice, the Supreme Court and the Japan Federation of Bar Associations (JFBA)). Since 1975, this has been done through the Three-Party Committee on the Legal Profession (*Hoso Sansha Kyogikai*), that was created in response to the adjunct resolution of the Diet in 1970 and 1971<sup>5</sup>. The Cabinet, the legislature and the people have not shown much interests in strengthening the judiciary. Hence, the role of law in Japanese society has not been large and is commonly called "niwari shihou" (20% Judiciary), which means that the judiciary has performed only 20% of its judicatory duties.

#### B. Judicial Reform in the 1980s-1990s

Japan's postwar justice system began to change at the end of the 1980s<sup>6</sup>. In the latter half of the 1980s, Japan's business got brisk and the bubble economy emerged. At that time, many new graduates of the Legal Training and Research Institute (LTRI) wanted to become attorneys who could earn a lot of money, while there were not many applicants to the public prosecutor. The Ministry of Justice concerned about the decrease of new public prosecutors and proposed to reform the bar examination system at the Three-Party Committee on the Legal Profession. With the opinions of the Committee for

the System of Training of the Legal Profession and Related Matters (*Housou Yousei Seido Tou Kaikaku Kyougikai*) including non-lawyers, the number of passers of bar exams rose from 500 to 1,000 in the 1990s<sup>7</sup>.

In this period, certain judicial reforms were sought within the legal professions. The Supreme Court began to survey the systems of jury and lay judges in Anglo-American countries and agreed to establish the procedure of appointing lawyers as judges with the JFBA in 1988. It also changed the civil procedure in the 1990s. And in 1990 the JFBA proposed a 'Declaration for Judicial Reform', in which the JFBA demanded an increased budget for the judicial branch, introduction of a jury system, introduction of *housou ichigen* (the judicial appointment system that all judges be appointed from other legal professionals) and other issues. In the 1990s, the JFBA set up the *toban bengoshi* (rotating-duty lawyers) system to defend suspects and promoted the establishment of "legal consultation centers" and "publicly-run firms" to improve legal services in local areas.

In addition, in the 1990s, major business organizations such as the Federation of Economic Organizations (*Keidanren*) began to call for judicial reform under the slogan "from the excessive advance-control/adjustment type society to an af-

ter-the-fact review/remedy type society" to suit globalization and deregulation. Facing the bursting of the bubble economy in the early 1990s, business circles demanded reinforcement of the oversight of the judiciary rather than the administrative control. The Liberal Democratic Party (LDP), the leading party in the coalition government, responded to the call from business leaders and issued its judicial reform proposals in 1997 and 1998, establishing an advisory body to consider judicial reform.

## II. RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL

According to the LDP's proposal, the Justice System Reform Council (JSRC) was established in the Cabinet in 1999. The JSRC held 63 meetings for two years and submitted its recommendations to the Cabinet on June 12, 2001<sup>8</sup>.

The JSRC had some interesting characteristics. Firstly, concerning its composition, the JSRC was made up of thirteen members, a majority of whom were non-lawyers<sup>9</sup>. Secondly, the JSRC was relatively open to the public. The media could attend meetings and minutes appeared on the web site with names of each speaker. In addition, in parallel with debates inside the JSRC, it received opinions and requests by mail and e-mail from the citizenry, and held public hearings at four

locations throughout the country. Thirdly, as an ideal of reform, the JSRC attached importance to the role of the judicial system, legal profession and public participation.

The attention to the justice system, legal profession and people had an implication to reinforce and strengthen the justice system mainly by achieving a legal profession that is rich both in quantity and quality, expanding popular participation in justice and people's cooperation with legal professionals. Deliberations on specific topics were guided by the ideal of a reliable justice system that is constituted of legal professionals that support and cooperate with the people. As a result, the reform discussions tended to be both detailed and wide.

After receiving the recommendations of the JSRC, the Cabinet decided to put them into practice. The Office for the Promotion of Judicial System Reform, which was established in the Cabinet from December 1, 2001 to November 31, 2004, proceeded with the drafting work of the bill as needed with reference to the discussion of its eleven Examination Committees (*Kentoukai*)<sup>10</sup>. The members of the Office for the Promotion of Judicial System Reform were Cabinet ministers and its Administrative Office was composed mostly of officials<sup>11</sup>. Examination Committees included lawyers, law professors

and non-lawyers. They were established in the Administrative Office for the Promotion of Judicial System Reform without any legal foundations, and did not have the power to submit their recommendations. So, the Administrative Office for the Promotion of Judicial System Reform mainly drafted bills except about issues concerning civil procedures, which were considered by the Ministry of Justice. 24 related laws have been already made as of the end of 2004: five laws in 2002, seven laws in 2003 and twelve laws in 2004.

### III. CONTENT OF THE REFORM

Judicial reform topics in the early 21<sup>st</sup> century can be roughly divided in three parts as the JSRC advocated. First, there are reforms to create legal professionals that are rich both in quantity and quality (legal profession). Second, there are reforms to strengthen the civil and criminal justice system (legal administration). And third, there are reforms to expand public participation in justice (public participation in the judicial system). I will sketch the content of the reform in these three parts.

#### A. *Legal Profession*

##### 1. Expansion of Legal Professionals

As of April 1, 2004, the total number of legal professionals is 24,130: Judges (2385); public prosecutors (1,505); and attorneys (20,240)<sup>12</sup>. To be qualified as legal

professionals, candidates must pass the NBE and complete professional training (apprenticeship) at the LTRI for one and half years<sup>13</sup>.

The number of successful candidates was 1,170 in 2003. The JSRC aimed to secure 3,000 candidates by the year 2010. If this process of increasing the legal population succeeds, the number of legal professionals is expected to be doubled and reach 50,000 by 2018. The JFBA had been reluctant to increase the passers of the NBE, but it decided to permit the increase based on "societal demand" in November 2000.

##### 2. Establishment of Law Schools

The NBE is a highly competitive exam and the passing rate has been around 2.5 %. In order to pass the exam, most applicants go to prep school but do not necessarily attend university classes. In these circumstances, the JSRC recommended the establishment of law schools that provide a professional education to students so that most graduates could pass the NBE. In 2004, 68 law schools were newly established and 5,776 students had entered as of April 6.

##### 3. Reform of the Legal Profession

###### (1) Reform of Judges

The ratio of judges to 100,000 people in Japan was 1.87 in 2004. This is not a large number compared to other countries<sup>14</sup>.

The JSRC proposed to expand the number of judges at least 500 in ten years.

The JSRC tried to reform judges in three ways; diversification of the sources of new judges, reexamination of the procedures for appointments and securing transparency and objectivity of the personnel system.

First, the system in which assistant judges gain experience in positions other than that of judge is going to begin in April 2005. The promotion of the appointment of lawyers as judges was required by the JSRC, but has not been fully realized<sup>15</sup>.

Second, concerning the appointment of inferior court judges, under the current system, the Cabinet appoints judges for the lower courts based on a list of persons nominated by the Supreme Court. The same applies to reappointments every ten years. In order to reflect the views of the people in the judicial nomination process, the Lower Court Judges Nominating Advisory Commission was established in 2003. The majority of members are non-lawyers<sup>16</sup>.

Third, to secure transparency and objectivity of the personnel system, judicial evaluation that had been conducted informally was reconsidered and prescribed in the Supreme Court Rule in 2004.

And to reflect the views of the people in the management of the courts, the Family Court Councils that mainly consist

of lay members were strengthened and the District Court Councils were newly established in 2003.

#### (2) Reform of the Public Prosecutor System

The number of public prosecutors is to be increased about 1,000 in the future. For the purpose of learning the attitudes and feelings of the general public, some prosecutors are going to work for two years in law firms. However, this will be fewer than ten per year.

To enable the voices of the people to be heard and reflected in the management of the public prosecutors offices, the Public Officer Screening Commission that had been inactive for years was reorganized in 2002.

#### (3) Reform of the Lawyer System

So as to secure transparent and reasonable lawyer's fees, binding standards for lawyers' fee were abolished. As to the bar association, the JFBA Civil Meeting that consists of lay members was newly established in 2003 to reflect people's views in the administration of associations.

In disciplinary procedures, the Screening Committee on Investigation and Prosecution, which is composed of lay members and screens any objections from citizens to the decision by the Investigation and Prosecution Committee of the local bar association, was newly established. Lay members of the Investigation and

Prosecution Committee were granted voting rights.

### B. *Legal Administration*

#### 1. Reform of the Civil Justice System

##### (1) Reinforcement and Speeding Up of Civil Justice

- To reduce the period of trial, a law was passed demanding the first instance proceedings end in principle within two years<sup>17</sup>.

##### (2) Strengthening Handling of Cases Requiring Specialized Knowledge

- The Expert Commissioner system was introduced in which non-lawyer experts in specialized fields become involved in all or part of trials to support judges.

##### (3) Strengthening of Comprehensive Response to Cases Related to Intellectual Property Rights

- For proper and prompt processing of disputes over intellectual property rights, a specialized division for intellectual property litigation was set up in the Tokyo High Court.

##### (4) Strengthening of Comprehensive Response to Labor-Related Cases

- To realize proper and prompt resolution of labor-related cases, labor tribunal committees composed of one professional judge and two non-lawyers are to be established. Half of the lay judges will be recruited from labor and the other half from management.

##### (5) Improvement of Functions of Family

#### Courts and Summary Courts

- Depending on subject matter, the upper limit on procedures for small-claims litigation in summary courts was raised<sup>18</sup>.

- All family-related cases were transferred to the family courts. Furthermore, so as to reflect wider viewpoints in society, the family court councilor system was expanded to involve councilors in divorce trials and other suits. They are now allowed to question witnesses and give their opinions on the desirable resolution of a case.

- With regard to civil conciliation, the JSRC recommends that measures, including a reconsideration of selection methods, should be taken to secure diversity of members, family affairs conciliation members, judicial commissioners and court councilors, in terms of age, occupation, knowledge, experience, and so forth.

##### (6) Strengthening of the Civil Execution System

- To secure the effectiveness of execution of rights, related laws were revised in 2003.

##### (7) Expansion of Access to the Courts

- To provide consultation windows (access points) at which a person can obtain one-stop comprehensive information concerning dispute resolution procedures such as adjudication and extra-judicial alternative dispute resolution (ADR) mechanisms, Japan Legal Support Centers are to be established throughout the country in 2006.

- The procedure in which the losing party must pay all legal bills of the winner has been discussed, but due to opposition by consumer groups, bar associations and others, the bill was rejected in the Diet.

(8) Reinforcement and Vitalization of Alternative Dispute Resolution (ADR) Mechanisms

- To promote ADR, the basic law that prescribes ADR was legislated for the first time.

(9) Reinforcement of the Checking Function of the Justice System vis-a-vis the Administration

- With regard to the judicial review of the administration, the Administrative Case Litigation Law was firstly amended in its material contents after its creation in 1962. The amended law expanded plaintiff capacity, liberalized time limitations on filing suits and newly prescribed actions to impose duties and preventive actions against omissions.

2. Reform of the Criminal Justice System

(1) Reinforcement and Speeding Up of Criminal Trials

- The JSRC recommends securing court sessions over consecutive days to speed up criminal trials, which rarely take many years. First instance trials are required to end in principle within two years. The same goes for both criminal and civil cases.

(2) Establishment of Public Defense System for Suspects and Defendants

- A public defense system for suspects was introduced for the first time. The Japan Legal Support Centers will perform public defense services for suspects and defendants.

(3) Rehabilitation of Offenders, Protection of Victims

- In order to strengthen the system of volunteer probation officers, the JSRC recommends that measures should be considered for hiring suitable persons.

3. Responses to Internationalization

- The reinforcement and speeding up of litigation concerning intellectual property.

- To promptly resolve international civil and commercial disputes, arbitration law was enacted in 2003.

- From the standpoint of actively promoting collaborations and cooperation between Japanese lawyers and foreign law solicitors, requisites for specified joint enterprises were relaxed and the prohibition on the employment of Japanese lawyers by foreign law solicitors was abolished.

- So as to assist the wide utilization of Japanese laws, English translation is to be promoted.

### C. *Public Participation in the Judicial System*

#### 1. *Saiban-in System*

Saiban-in are chosen at random for each case from members of the general public. Together with professional judges, they take part in the deliberation of guilt and sentencing in the trials of certain serious crimes. In normal cases, three professional judges and six saiban-in work together<sup>19</sup>.

#### 2. Strengthening of the Inquests of Prosecution

Regarding the Inquests of Prosecution<sup>20</sup>, a new law grants a legally binding effect to those resolutions in which eight out of eleven members concur to prosecute.

#### 3. Others

As we saw in this paper, many ideas were realized to expand the public participation in justice throughout judicial reform: introduction of an expert commissioner system, reinforcement of the conciliation member, judicial commissioner and court councilor systems, reinforcement of the Inquest of Prosecution system, reinforcement of the volunteer probation officer system, establishment of the labor tribunal committees, establishment of a body to reflect popular views in the process for the nomination of judges (the Lower Court Nominating Advisory Commission), and reinforcement of mechanisms

so as to better reflect public views with regard to the administration of the courts (the reinforcement of the Family Court Commissions and establishment of the District Court Commissions), the public prosecutors offices (reorganization of the Public Officer Screening Commission), and the bar associations (establishment of the JFBA Civil Meeting).

## IV. EVALUATION OF THE REFORM

### A. *Conflicting Views*

There are two conflicting views in evaluating recent judicial reform. Some scholars and lawyers criticize judicial reform in the 1990s for being acceptable in terms of deregulation and business needs but in lacking regard for human rights and the autonomy of lawyers. Others claim that recent judicial reform is insufficient in some ways but look at it as an initial step toward further profound reform.

It is true that recent judicial reform has some deficiencies. First, the police, prosecutor and criminal justice systems were left almost untouched. The *Daiyou kangoku* (use of custody facilities in police stations in lieu of detention facilities) system was not reformed. Regarding the questioning of suspects, audio and video recording of the questioning itself and the attendance of the defense counsel at the questioning are still not allowed. Second,



in terms of the reform of judges, there are no clear standards in judicial assignment and increases in compensation for judges after approximately 20 years of services. So, the current system might damage the independence of judges. Third, there are some matters of concern in recent reforms. Although the number of legal professionals is increasing, judges are not expected to increase so much as to be able to cover these cases. Since the number of law schools was beyond the anticipation of the JSRC, all law school graduates will not necessarily pass the NBE. Successful candidates are to be limited to 3,000 even in 2010. And some scholars insist that the *saiban-in* system will not work properly in the current criminal justice system in which the questioning of a suspect is not necessarily transparent, the prosecutor has discretion whether to prosecute or not and the guilty rate is more than 99 %. Criminal procedure must be changed and legal professionals should seek to realize speedy and clear justice to activate the *saiban-in* system.

#### B. Characteristics of Recent Judicial Reform

Recent judicial reform has many faces, so its evaluation will depend on which side one takes. Some reforms are preferred by the business world, such as the strengthening of response to intellectual property cases and civil execution. The speeding up

of trials will also meet business needs. However, internationalization is still moving along slowly. Even though judicial independence was emphasized as the theme of judicial reform, in fact, the reinforcement of the judicial-check function vis-à-vis legislation and administration and the securing of independence for judges were incomplete. On the other hand, public participation in the judicial system and legal access will proceed mainly through *Saiban-in* system and Japan Legal Support Centers.

Actually, judicial reform in the early 21<sup>st</sup> century has not necessarily strengthened the judicial system as advocated by business leaders and the LDP. Rather than emphasizing an after-the-fact review/remedy function and strengthening of the judiciary, greater importance has been attached to rationalization of the court capacities, public participation, and access to justice. Characteristics of judicial reform cannot be defined only by a proposed ideal. Rather, they need to be considered in terms of a dynamic reform movement in each issue. The three branches of the legal profession, government departments, political parties, universities and other groups have abruptly reflected on judicial reform discussions. The result has been a complex debate.

## CONCLUSION

After the establishment of the JSRC, the media has reported about judicial reform and problems of the current judicial system and the judicial reform process came to be watched with great interest by Japanese citizens. A man concerned in business circles is reported to have described the judicial reform discussion as a fire metaphor and said that 'a fire we ignited at the beginning changed to a forest fire in the end'<sup>21</sup>. Some scholars insist that Japan has been a society where people tend to hesitate to resort to the judiciary because Japanese judicial system is not accessible and user-friendly<sup>22</sup>. However, recent reform has a character that promotes legal access and public participation and will somewhat awaken people's latent demand for the judiciary over the past fifty years. Still, many issues remain that require reform. The future of the justice system depends on the efforts of the legal professionals and citizens to manage the reformed justice system and to improve it to secure fair and reliable justice based on sound legal profession, legal administration and public participation.

1 Under the 1947 Constitution Japan has a unitary court system with five kinds of courts: one Supreme Court; eight high courts; fifty district courts and 203 district court branches; fifty family

courts; and 438 summary courts. The number of district court branches was reduced from 242 to 201 in 1990 and rose to 203 in 1993. Summary courts were reduced from 575 to 452 in 1988 and to 438 in 1999.

- 2 The number of cases was 155,015 in 1950 and rose to 1,301,938 in 2002, while judges increased from 1,533 to only 2,288.
- 3 The passers of the bar exams had been fixed for 500 from 1964 to 1990 per year.
- 4 The budget for the courts occupied 0.501% of the total national budget in 1948 and rose to 0.938% in 1957, but thereafter it gradually fell to 0.396% in 1983 and this ratio remains almost unchanged until now.
- 5 In terms of the Three Party Committee and judicial policy making process, See Takayuki Ii, The Stance and Characteristics of the Japan Federation of Bar Associations in Judicial Policy Making Process: Mainly after 1990, 61 Houshakaigaku (2004) p.132.
- 6 Concerning Japan's judicial reform in the end of the 20<sup>th</sup> century, See Iwao Sato, Judicial Reform in Japan in the 1990s: Increase of the Legal Profession, Reinforcement of Judicial Functions and Expansion of the Rule of Law, 5 Social Science Japan Journal (2002) p.71; Setsuo Miyazawa, The Politics of Judicial Reform in Japan: The Rule of Law at Last?, 2 Asia Pacific Law & Policy Journal (2001) p.89, at <http://www.hawaii.edu/aplpj/pdfs/v2-19-Miyazawa.pdf>.
- 7 The Committee consisted of 22 members including ten non-lawyer members (six members were law professors).
- 8 English version of recommendations of the JSRC is viewable at [http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612\\_e.html](http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html).
- 9 The composition was three lawyers practically retired from three branches of the legal professions, three law professors and seven non-lawyers. Non-lawyers members consisted of professors of non-legal fields (2), persons of enterprise (2), persons of consumer organization and labor organization and a writer. Members were appointed by the Cabinet and approved by the Diet.
- 10 Examination Committees were established in the field of labor, legal access, ADR, arbitration, administrative litigation, *saiban-in* and criminal procedure, public defense system, internationalization, legal education and training, legal profession system and intellectual property.
- 11 The members of the Administrative Office were 60; fifteen judges, four court officials, eleven public prosecutors, seven officials of the Ministry of

- Justice, seventeen officials of twelve government departments, four attorneys and two non-lawyers (as of April 1, 2003).
- 12 Judges and public prosecutors are fixed numbers and the number of vice public prosecutors (899) and summary court judges (806) is not included above.
  - 13 The term for apprenticeship was two years until 1998. The term is going to be reduced to one year and four months for usual NBE passers and one year for graduates of law schools from 2006. In 2003, among new LTRI graduates of 1005 (225 female), 101 (29) were appointed to assistant judges, 75 (19) were appointed to public prosecutors, 822 (175) served as attorneys and others were seven (two).
  - 14 The number of judges in the same proportion to people is 10.85 in the United States; 7.25 in England and Wales; 25.33 in Germany; 8.78 in French (*Saikou Saibansho Jimu Soukyoku* (General Secretariat of the Supreme Court) SAIBANSHO DATA BOOK 2004 (2004) pp.25-26. Its original source varies from 2002 to 2004 by countries). The total population of Japan is 127,619,000 as of October 1, 2003.
  - 15 Attorneys who were appointed to judges are 77 from 1988 to 2004. The number has been slightly increasing (3, 5, 10 and 10 from 2001 to 2004). And to push the judicial appointment from lawyers and to enrich the trial of the courts, the Mediation Officers system in civil and family cases (*Kaji Tyouteikan, Minji Tyouteikan*) at part-time services was established in 2003.
  - 16 The commission consists of six non-lawyer members (including one former judge and two law professors) and five lawyer members (two judges, two lawyers and one public prosecutor).
  - 17 The average duration of proceedings for all first instance civil cases at district court was 9.2 months as of 1999, but for cases involving examination of personal evidence the average duration of proceedings rose to 20.5 months as of 1999.
  - 18 With regard to the subject matter jurisdiction of summary courts, the upper limit on the amount in controversy was raised from 900,000 yen to 1,400,000 yen. The upper limit on the amount in controversy in procedures for small-claims litigation was raised from 300,000 yen to 600,000 yen.
  - 19 Exceptionally, when the defendants plead guilty and both parties (attorneys and public prosecutors) concur, one professional judge and four saiban-in could sit on the bench.
  - 20 The Inquest of Prosecution system was established in 1948 to reflect public opinion in the exercise of the public prosecution authority in order to secure its fairness (the members of the Inquest are selected from the voters by lot). It is a quasi grand jury system and has great significance as a part of the system of popular participation in justice.
  - 21 The Asahi Shinbun, November 16, 2000.
  - 22 See, e.g., John O Haley, *The Myth of the Reluctant Litigant*, 4 *Journal of Japanese Studies* (1978) p.349.
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